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Supreme Court, U.S.
FILED
APR 5 1988
JOSEPH F. SPANIOL, JR.
CLERK

NO.

IN THE SUPREME COURT OF THE UNITED STATES

October Term 1987

ANTHONY DUANE MILLER,
Petitioner,
vs.
STATE OF CALIFORNIA,
Respondent.

On Petition for Writ of Certiorari to the Court of Appeal of the State of California, First Appellate District, Division Four.

Albert M. Kun
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QUESTIONS PRESENTED

1. Whether the Supreme Court of California violated Petitioner's Rights guaranteed under the Fifth, Sixth and Fourteenth Amendment Due Process clause by failing to properly instruct the jury regarding Petitioner's right to self-defense.

PARTIES TO THE PROCEEDINGS

The only parties to the proceedings are Petitioner Anthony Duane Miller and the State of California.

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OPINIONS BELOW

The opinion of the Supreme Court of the State of California (Appendix A, infra) is unreported the decision of the California Court of Appeal, First Appellate District is unreported.

JURISDICTION

The Order of the Supreme Court of the State of California was filed in January 6, 1988. This petition is filed pursuant to Rule 17 of the Rules of the Supreme Court of the United States.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Amendment V to the United States Constitution states: No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to

be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Amendment XIV to the United States Constitution states:

. . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law . . .

STATEMENT OF THE CASE

Petitioner, Anthony Duane Miller, was convicted of involuntary manslaughter, following a jury trial, while personally using a 38 caliber revolver. The trial court sentenced petitioner to state prison for the lower term of two years. Petitioner was granted bail pending his appeal. At the trial, on appeal and in this petition

Petitioner maintains that the information should have been dismissed in as much as by modifying the common-law rule of self defense the California legislature created an inalienable right to use deadly force in defense of one's home. Such inalienable right is to be protected by the Second, Fifth, and Fourteenth Amendments to the United States Constitution.

REASONS FOR ALLOWANCE OF WRIT

The California trial court denied petitioner's due process rights guaranteed by the Fourteenth Amendment to the United States Constitution by failing to dismiss the information and in failing to instruct that use of deadly force is an affirmative defense.

Section 198.5 of the California Penal Code the "Home Protection Bill of Rights, adoped in 1984 (see Stats. 1984, ch 1666, paragraph 2) provides that "any person using force intended or likely to cause death or great bodily injury within his or

her residence shall be presumed to have held a reasonable fear or imminent peril of death or great bodily injury to self, family, or a member of the household when that force is used against another person, not a member of the family or household, who unlawfully and forcibly enters or has unlawfully and forcibly entered the residence and the person using the force knew or had reason to believe that an unlawful and forcible entry occurred. As used in this section great bodily injury means a significant of substantial physical injury (Stats. 1984, ch. 1666, Section 1).

By passing the "Home Protection Bill of Rights" the Calfiornia legislature intended to provide a substantive right to its citizens to use self-defense under certain conditions in defense of their home. By modifying the common-law principle of self-defense the California Legislature intended to confer a fundamental right to be protected by the Fifth, Sixth and Fourteenth Amendments to the Constitution.

CONCLUSION

The California Legislature intended self-defense of one's home to be a fundamental right to be protected by the United States constitution, Amendment 5, 6 and 14. The Court should grant this Writ in protection thereof.

Respectfully submitted,

Albert M. Kun

ALBERT M. KUN
Attorney for Petitioner

CERTIFICATE OF PERSONAL SERVICE

I declare that:

I am employed in the City and County of San Francisco, California. I am a citizen of the United States, over the age of 18 years and not a party to or interested in the within cause. My business address is 381 Bush Street Suite 200, San Francisco, California 94104.

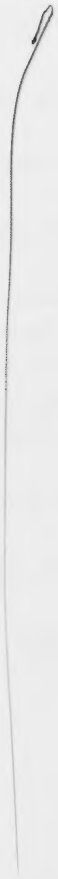
On this day I serve the following document: Petition for Writ of Certiorary by causing personal delivery of a copy of said document(s) to the following person(s) at the address(es) indicated:

John K. Van de Kamp
Attorney General
6000 State Building
455 Golden Gate Ave.
San Francisco, CA 94102

I declare under penalty of perjury that the follwing is true and correct.

Executed at San Francisco, California on April 4, 1988.

Mary Butler
MARY BUTLER



ENTERED
Jan. 6, 1988
Laurence P. Gill, Clerk

ORDER DENYING REVIEW

AFTER JUDGMENT BY THE COURT OF APPEAL

1st District, Division 4,
No. A035161
S002850

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

IN BANK

PEOPLE

v.

ANTHONY DUANE MILLER

Appellant's petition for review DENIED.

LUCAS
CHIEF JUSTICE

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FOUR

ENTERED
September 15, 1987
Ron D. Barrow, Clerk

THE PEOPLE,

Plaintiff and Respondent,

v.

ANTHONY DUANE MILLER,

Defendant and Appellant. / (Contra Costa County Super. Ct. No. 31022)

A035161

Following a jury trial, appellant Anthony Duane Miller was convicted of involuntary manslaughter while personally using a 38-caliber revolver. (Pen. Code, §§ 192, subd. (b), 12022.5.)[1] After stiking the enhancement pursuant to section 1170.1, subdivision (h), the trial court sentenced appellant to state prison for the lower term of two years. A timely notice of appeal was filed. Appellant was granted bail pending his appeal.

In his appeal, appellant raises issues involving the applicability of section 198.5, the

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1. All further statutory references are to the Penal Code.

so-called "Home Protection Bill of Rights," adopted in 1984. (See Stats. 1984, ch. 1666, § 2.) That statute relates to the rights of a resident in certain circumstances to use deadly force against another person who unlawfully and forcibly enters the residence.[2] We conclude that the trial court properly instructed the jury in this case. We therefore affirm the judgment.

I. FACTS

Appellant and Terry Toler lived in adjoining apartment units in San Pablo. Appellant was not acquainted with Toler, who lived with his mother and stepfather.

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2. Section 198.5 provides: "Any person using force intended or likely to cause death or great bodily injury within his or her residence shall be presumed to have held a reasonable fear of imminent peril of death or great bodily injury to self, family, or a member of the household when that force is used against another person, not a member of the family or household, who unlawfully and forcibly enters or has unlawfully and forcibly entered the residence and the person using the force knew or had reason to believe that an unlawful and forcible entry occurred. [¶] As used in this section, great bodily injury means a significant or substantial physical injury." (Stats. 1984, ch. 1666, § 1)

At approximately 11:45 p.m. on February 21, 1985, Toler's mother returned home and found blood on the bathroom floor. She noticed the stereo was playing abnormally loud. After looking around, she found her son's body, lying inside any open hatchway above the bathroom floor leading to an attic area.

Although no entry wound was detected by investigating officers at the scene, the cause of Toler's death was determined to be a gunshot wound to the brain. A single bullet had apparently pierced Toler's left hand and entered his head by the nose. Toxic examinations indicated Toler had a blood alcohol level of .23 percent, and significant amounts of methaphetamine and amphetamine were found in his system.

At trial, there was no dispute that appellant had fired the fatal shot. The issue was whether the homicide was justifiable. According to appellant's testi-

mony, he had come home from work earlier that evening and noticed that the stereo was playing quite loudly next door. As it was not yet quiet time, he didn't say anything.

Shortly after 7 p.m., appellant heard "some light rapping on the wall." This puzzled and startled him. Appellant turned down his own television, and sat down to watch the news. All of a sudden, he heard "some very powerful vibrations, sort of like thuds on the wall." They lasted approximately 20 seconds, and were powerful enough to cause a painting to bounce four inches off the wall. Appellant testified he was "scared" and "very frightened."

Stating that he was "quite concerned that something might develop," appellant went to his bedroom and got his gun and four rounds of ammunition. He went back to his living room, walked towards his

television set, when suddenly he "heard a loud crashing noise behind [him]."

He testified, "I turned at this point to investigate rather hurriedly to see what was developing. [¶] When I got completely turned around--of course, I should say here before I got turned around that I did see the wall being broke in. [¶] And then as I was completely turned, very frightened, I raised my gun at this point to the level of the intrusion on the wall. [¶] At this point I discharged my weapon once." Describing his feelings at the time, appellant said he was "very scared, very frightened. I mean I realized that there was danger here. I actually thought that serious harm would come to me."

Appellant added: "Perhaps I should put this in my testimony. [¶] When I turned, . . . I was observing the hole being broken into and a leg, part of a foot was in the hole . . . The leg and part of a foot was extending through the hole."

During cross-examination, appellant admitted that he had purposely pulled the trigger. He explained that he "was in great fear. . . [¶] [J]ust out of fear, frightened half to death, I brought it up there and pulled the trigger." He paused to see if there was any return fire. There was none. He testified that after a minute or two, he heard the sound of a door slamming next door.[3] Thereafter, there were no further noises, other than the loud rock music, which he now heard more clearly through the hole in the wall.

Appellant put the gun down and made a series of phone calls. He called the president of the homeowner's association and left a message on his answering device. He then called the person in charge

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3. Although appellant made several statements to officers, the first reference he made to observing the leg or foot through the hole, or of hearing the door slam, was in his direct examination at trial.

of security for that group. In each case, he mentioned the loud noise and the fact that someone had broken through his wall. He did not mention that he had fired any shots. Appellant then called another neighbor, from whom he was able to get the phone number for next door. When he called, no one answered. He then put the gun and the three unspent shells in his safe. He flushed the empty shell down the toilet. At some point, appellant spackled the wall to cover up the bullet hole. At approximately 7:56 p.m., he called the police.

When the police arrived, he told them the same story he had told his neighbors, without mentioning he had fired the gun. The police became aware of the homicide only after they were called by the victim's mother several hours later. Although appellant was interviewed several times that night, he made no made no mention of firing the gun until after the coroner had x-rayed the body and discovered the bullet in the victim's brain.

II. DISCUSSION

Appellant contends the trial court erred in denying his pretrial motion to dismiss under secion 995, in applying the presumption set forth in section 198.5, and in failing to instruct the use of deadly force is an affirmative defense in this case. None of these contentions has merit.

Considering the instructional issue first, we note that the trial court not only instucted the jury pursuant to CALJIC No. 5.42, 1974 revision, the standard instruction on resisting an intruder upon one's property, but instructed as well in the statutory language of section 198.5, as requested by appellant. Appellant entered no objection to these instructions, not did he request the court to modify or tailor them in any way.

It was proper to give each instruction. A key element in bringing section 198.5 into play is whether the victim "unlawfully and forcibly entered the residence." (See fn. 2, ante.) Defense counsel acknowledged

when arguing to the jury that "one of the most important factors for you to consider [is] whether there has been an entry." A sufficient entry is made if any part of the intruder, such as a foot, is insde the premises. (People v. Failla (1966) 64 CAl.2d 560, 569; see People v. Allison (1927) 200 Cal. 404, 407-408.)

Although appellant testified that a leg and part of a foot was extending through the hole in his wall, the jury was not compelled to believe that testimony. Appellant apparently had not mentioned that fact during several earlier statements to officers. The jury also had before it physical evidence, in the form of a piece of the sheetrock wallboard and the victim's shoes, from which it could determine for itself whether the foot could have entered into appellant's residential space. As it was a question of fact whether secion 198.5 was applicable, it was proper for the trial court to instruct both in terms of CALJIC No. 5.42, and the new statute.

Moreover, it was appropriate to instruct on the new principle in the statutory language of section 198.5 (see People v. Failla, supra, 64 Cal.2d at p. 565), particularly so since that was the way in which appellant requested it. If appellant believed the instruction required modification, it was his duty to propose it. "The trial court cannot reasonably be expected to attempt to revise or improve accepted and correct jury instructions absent some request from counsel." (People v. Wolcott (1983) 34 CA1.3d 92, 108-109.)

Turning to the remianing issues, it is not clear from the record that appellant ever made a motion under section 995. Failure to move to set aside an information bars the defense from questioning on appeal any irregularity in the preliminary examination. (People v. Pompa-Ortiz (1980) 27 Cal.3d 519, 529.) Assuming appellant did make such a motion, any irregularities in the preliminary examination, and any error by the trial court in reviewing the irregularities, can be successfully urged as a basis for reversal on

appeal only if appellant can show he was in some way denied a fair trial or otherwise prejudiced at his subsequent trial. (Id., at pp. 522, 529.)

Nothwithstanding the statutory presumption, appellant can show no prejudice herein. This court must presume all facts and inferences reasonably supporting the judgment. (See People v. Johnson (1980) 26 Cal.3d 557, 576.) Here, there was evidence from which the jury could reasonably infer that the victim did not enter appellant's apartment. Under those circumstances, the jury could conclude that appellant's shooting was an unreasonably excessive use of deadly force in response to the battering Toler was making upon their common wall. In that situation, neither the statutory persumption set forth in section 198.5 nor the traditional concepts of self-defense would exonerate the appellant.

The judgment is affirmed.

Channell, J.

WE CONCUR:

Poche, Acting P.J.

Sabraw, J.